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No. 86-354

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STEWART G. HUBER, MYRON A. MAIEWSKI, JOHN F. APITZ, BILLY R. BURKE, WILLIAM F. BURNETTE, BRIAN D. BURNS, LARRY E. DAHL, and J. FRED KING,
Petitioners,

v.

UNITED STATES MERIT SYSTEMS PROTECTION BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

BRIEF FOR AMICUS CURIAE NATIONAL TREASURY EMPLOYEES UNION IN SUPPORT

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QUESTION PRESENTED

Whether the court below erroneously, and in conflict with precedent of this Court, held that the Merit Systems Protection Board may review the dismissal of federal employees as if the action was taken on a different basis than that relied upon by their employing agency?

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STATEMENT OF INTEREST OF THE AMICUS CURIAE

The National Treasury Employees Union (NTEU) is the third largest federal sector labor organization. Pursuant to Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. Section 7701 *et seq.*, NTEU is the exclusive bargaining representative of approximately 110,000 federal employees throughout the nation, including individuals like the petitioners who are in "Excepted Service" positions. NTEU represents the employment interests of

the members of its bargaining units, *inter alia*, by negotiating collective bargaining agreements with federal agency employers, by arbitrating grievances under such agreements, and by providing employees with representation before the Merit Systems Protection Board ("Board"). Thus, the interests of NTEU, and the federal employees it represents, will be affected by any decision in this case, which involves the standards under which agency personnel actions are reviewed, and the proper role of the Board in such disputes.

OPINIONS AND JUDGMENT BELOW

The Opinion of the United States Court of Appeals for the Federal Circuit (Pet. App. 1a-9a) and its Judgment (Pet. App. 48a) were entered on June 5, 1986. The Opinion is reported at 793 F.2d 284.

The Opinion and Order of the Merit Systems Protection Board which the Court of Appeals affirmed was entered on January 31, 1985 (Pet. App. 10a-20a). It is unofficially reported at 28 M.S.P.R. 17, *sub nom. Blalock, et al.* v. *Department of Agriculture.* The Initial Decision of the Chief Administrative Law Judge of the Board was entered on January 12, 1983 (Pet. App. 21a-47a). It is not reported.

JURISDICTION

The Opinion and Judgment of the United States Court of Appeals for the Federal Circuit were entered on June 5, 1986.

Jurisdiction of this Court is invoked under 28 U.S.C. section 1254(3).

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of Title 5, United States Code, and of 5 Code of Federal Regulations, are set forth in the Petitioners' Appendix, at pp. 49a-53a.

STATEMENT OF THE CASE

Petitioners, who are not veterans, and other persons who are veterans, appealed to the Board from their 1981 separation from employment with the Department of Agriculture in a reduction-in-force ("RIF") action. After a hearing, an Administrative Law Judge found that the Department of Agriculture had failed to carry its burden of demonstrating that a valid reduction-in-force had occurred. He determined that petitioners' positions, and supposedly new positions which the Department of Agriculture claimed had supplanted them, in fact were substantially the same. He further held that the separations had been motivated by reasons personal to the employees, namely, their political affiliation (Pet. App. 33a-34a, 43a).

The employees who were veterans were awarded reinstatement with backpay. Petitioners, however, were denied relief, and their appeals were dismissed for lack of jurisdiction. The basis for this ruling was that the action which was purportedly a RIF was in reality a disguised adverse action. The Administrative Law Judge opined that since petitioners, as Excepted Service employees, could appeal from a reduction-in-force but not an adverse action, the Board had no jurisdiction over their appeal once it was found that actually the separations were in the latter category (Pet. App. 44a).

After this ruling was accepted by the Board (Pet. App. 10a-20a), petitioners sought review in the United States Court of Appeals for the Federal Circuit. That court affirmed (Pet. App. 1a-9a). In response to petitioners' objection that the Board's reliance not on the personnel authority invoked by the Department of Agriculture, but on an entirely different authority violated the rule of *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194 (1947), the court held the *Chenery* rule inapplicable to the Board, asserting that "petitioners confuse the assigned roles of the Board, itself part of the

administrative agency structure, and the courts" (Pet. App. 6a). The court contended that the Board's powers to correct agency abuses or violations of law authorized it to "correct" the agency's misuse of the reduction-in-force authority by treating its action as having been taken under a different personnel authority (Pet. App. 7a).

REASONS FOR GRANTING THE WRIT

NTEU submits this *Amicus Curiae* Brief in support of the petition to underline the importance of the issues presented to the federal personnel law. NTEU agrees with petitioners' position on the merits of these issues, which we need not repeat at length.

THE RULING BELOW IS CONTRARY TO FUNDAMENTAL PRINCIPLES OF ADMINISTRATIVE LAW AND PERSONNEL LAW, AS WELL AS PRECEDENT IN THIS COURT.

1. The rule of *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194 (1947), is a bedrock one governing review of agency actions including personnel actions. *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959). In *Vitarelli*, this Court reversed lower court decisions affirming an agency's dismissal of a Schedule A Excepted Service employee for national security reasons. The Court recognized that generally Excepted Service employees can be dismissed without any statement of reasons or procedural protections. Nonetheless, it held that because the agency had invoked national security as the basis for its action, it was bound to comply with procedural regulations which the agency had promulgated concerning such cases "even though without such regulations [the agency] could have discharged [the employee] summarily." *Id.* at 539-540. Furthermore, the Court held that the agency's subsequent summary discharge of the employee did not cure its improper discharge for national security reasons. Accordingly, the Court ordered that the employee be reinstated with back pay, "subject of course to any lawful exercise

of [the agency's] authority hereafter to dismiss him from employment [with the agency]." *Id.* at 546.

Thus, in a case concerning the same class of employees as petitioners, this Court held that the removal of such employees may be sustained only on the grounds stated by the agency as the basis for its action, even if such employees are otherwise subject to summary dismissal. While the dissenting members of the Court disagreed with the majority as to the amount of the employee's entitlement to back pay in *Vitarelli*, they unambiguously agreed that the agency's action could not be sustained on grounds other than those offered by the agency (*Id.* at 546-7, citing *Chenery*). Thus, under the rule in *Vitarelli*, upon finding that the removal of petitioners could not be sustained as a RIF, the Board should have ordered that petitioners be reinstated with full backpay. Furthermore, in the instant case, unlike *Vitarelli*, the employing agency never even attempted to take proper action against the petitioners; rather, it was the Board which provided a rationale for the agency's action. Thus, this case presents even a more blatant violation of the *Chenery* rule, than did *Vitarelli*. Because the Federal Circuit's affirmation of the Board's decision is plainly at odds with this Court's decision in *Vitarelli*, the petition for a writ of *certiorari* should be granted.

2. The Federal Circuit held that the *Chenery* rule was inapplicable in the instant case because here the court was reviewing the final administrative decision of the Board, not the employing agency. It concluded that because the Board itself is part of the administrative structure in personnel actions, the Board is free to uphold personnel actions on grounds other than those relied upon by the employing agency. Pet. App. 6a. However, the court below has misconstrued the nature of the review performed by the Board under the Civil Service Reform Act. As the Court of Appeals for the D.C. Circuit has observed:

> In fashioning that watershed statute, Congress clearly intended that MSPB would carry out a detached quasi-judicial function. It was for this very reason that Congress provided for Presidential appointment of the three Board members, with the advice and consent of the Senate.

Barnhart v. *Devine*, 771 F.2d 1515 (D.C. Cir. 1985).

That Congress intended the Board to perform adjudicatory review of agency personnel actions is also demonstrated by the legislative history of the CSRA. In sending his proposed legislation to Congress, President Carter stated that establishment of the Board as an independent adjudicatory body was designed "to correct the inherent conflict of interest within the Civil Service Commission by abolishing the Commission and replacing it with a Merit Protection Board and Office of Personnel Management." H.R. Rep. No. 95-1403, *Civil Service Reform Act of 1978*, 95th Cong. 2d Cong. 2d Sess. (1978), p. 99. The intended function of the Board was described as follows:

> The Merit Protection Board will be the adjudicatory arm of the new personnel systems. It will be headed by a bipartisan board of three members, appointed for 7 years, serving non-renewable overlapping terms, and removable only for cause. This structure will guarantee independent and impartial protection to employees.

Id. at 100

This view of the function of the Board was carried forward in all versions of the bill. For example, Representative Udall, the floor manager of the bill in the House, stated:

> The adjudicatory judicial function of protecting the merit system which we have will be lodged in the Merit Systems Protection Board. The personnel management function will be headed up by the director of the OPM.

124 Cong. Rec. (Daily Ed.) H. 9381 (Sept. 11, 1978). Another sponsor of the bill, Senator Sasser, commented that "[n]early every witness who testified before the Committee on Governmental Affairs supported the concept of splitting the Civil Service Commission into an Office of Personnel Management and a Merit Systems Protection Board." He referred to the "need to establish the adjudicatory and the personnel management functions in two separate bodies . . . ." 124 Cong. Rec. (Daily Ed.) S. 14279 (Aug. 24, 1978).

Faithful adherence to the *Chenery* rule is a hallmark of an independent, impartial adjudicator. The Federal Circuit's reasoning that the Board need not obey the rule because it is "itself part of the administrative agency structure" (Pet. App. 6a), casts the Board in the role of personnel manager, rather than judge. It misconceives the role of this important Board, and is clearly inconsistent with the intent of Congress to establish the Board as an impartial adjudicatory body. The Federal Circuit's decision will adversely affect the many thousands of Excepted Service employees whose rights to Board review of dismissals in reductions-in-force will be rendered meaningless because the Board could simply characterize the dismissals as adverse actions. Accordingly the decision of the Federal Circuit should not be allowed to stand unreviewed.*

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* Furthermore, the Federal Circuit has completely ignored the impact of its decision on employees' choices of forum between the Board and arbitration under collective bargaining agreements such as those to which NTEU is a party. This Court held, in *Cornelius* v. *Nutt*, 472 U.S. ——, 105 S.Ct. 2882 (1985), that generally such arbitrators are to apply the same standards as the Merit Systems Protection Board. Yet the Federal Circuit has now ruled that because the Board is an administrative agency in the Executive Branch, it may disregard the *Chenery* rule and revise actions taken by the Executive Branch agencies. Such a role could not possibly be appropriate for arbitrators, impartial private individuals who by definition cannot function as policymakers or managers in the

CONCLUSION

For the reasons stated above, and in the Petition, the National Treasury Employees Union, as *Amicus Curiae*, urges this Court to issue the writ of *certiorari* in this case.

Respectfully submitted,

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Executive Branch. If the Federal Circuit's decision in the instant case stands, either the Board and arbitrators must function differently in like cases—in apparent contravention of *Cornelius*—or arbitrators must take on an unaccustomed and inappropriate role.